Elmer Nordstrom, Managing Partner, et al. d/b/a Seattle Seahawks and SSI, Incorporated d/b/a Seattle Seahawks, a Successor in Interest *and* National Football League Players Association. Case 19–CA–20652

August 27, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On March 20, 1991, Administrative Law Judge William J. Pannier III issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a brief in support of cross-exceptions and in opposition to the General Counsel's exceptions. The General Counsel filed a response brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Supplemental Decision and Order.

1. The discriminatee, Sam McCullum, earned $16,000 from participating in two playoff games with the Minnesota Vikings in the first quarter of 1983. The judge found that McCullum's playoff earnings constituted interim earnings which should be deducted from gross backpay for that period. We disagree.

Unlike McCullum's 1982 team, the Vikings, Respondent Seattle Seahawks did not make the playoffs at the end of the 1982 season, and thus McCullum would not have received income for playoff games during that period had he not been unlawfully waived. Because McCullum's income from playoff games was earned during a time in which he would not have been working for the Respondent, that income should not be considered interim earnings. Instead, it should be treated in the manner of earnings derived from working at an interim job that affords an opportunity to work more than the claimant would have worked for the discriminating employer, or at times when the latter did not have work available; such earnings are not deducted from backpay. See, e.g., *Lundy Packing Co*., 286 NLRB 141, 146–147 (1987) (excess overtime); *EDP Medical Computer Systems*, 293 NLRB 857 (1989) (extra earnings from longer workweek); *United Growers, Inc*., 59 NLRB 549, 550–551 (1944) (moneys earned during periods when seasonal employer would not have had work available).

Had he remained a member of the Seahawks, McCullum would have received $10,000 for playing one regular season game in the first quarter of 1983. We also find that he would have received an additional $3450 during that period for personal appearances.[2] His gross backpay for the period is, therefore, $13,450. Offset against that sum are McCullum's net interim earnings of $9143 ($10,000 for the final regular season game which he played for the Vikings, less $857 in expenses generated in earning that income). His net backpay for the first quarter of 1983 thus is $4307.[3]

2. The judge found that McCullum abandoned his search for interim employment commensurate with his background and experience as a wide receiver after the third quarter of 1984, and thus incurred a willful loss of earnings precluding an award of backpay for the remainder of the backpay period, which extended through the end of 1985. The General Counsel has excepted to the judge's findings in this regard. Although we agree with the judge that McCullum is not entitled to backpay for any part of 1985,[4] we find merit in the General Counsel's exceptions as they pertain to the fourth quarter of 1984, and we shall modify the judge's Order to provide backpay for that period.

The judge based his finding on the testimony of McCullum's agent, Robert Walsh. Walsh testified that, after McCullum was released by the Minnesota Vikings on May 30, 1984, he approached numerous other National Football League teams in an attempt to secure a position for McCullum. When pressed on cross-examination to specify how long he continued those efforts, Walsh stated,

> I can't give you the date. I don't recall. I know that we looked through the summer of that year and even into the fall, but I can't remember how long we did. I really don't.[5]

[1] The Respondent excepts to the judge's use of the quarterly method of computing backpay prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950). We find no merit to that exception. In any event, the Board in the underlying unfair labor practice proceeding ordered that backpay be computed by the *Woolworth* method, and its Order was enforced by the court of appeals. *Seattle Seahawks*, 292 NLRB 899, 932 (1989), enfd. mem. 888 F.2d 125 (2d Cir. 1989).

[2] The judge did not have to decide whether to accept the General Counsel's estimate, or that of the Respondent, for McCullum's earnings from personal appearances. We accept the General Counsel's, which in any event is only about 4 percent larger than the Respondent's, and thus can hardly be said to be unreasonable.

[3] Member Raudabaugh would adopt the judge's finding that McCullum's earnings from playoff games in the first quarter of 1983 should be counted as interim earnings and deducted from his backpay award. Unlike the majority, Member Raudabaugh agrees with the judge that the fact that McCullum's 1982 season with the Vikings was prolonged past that of the Seahawks is no reason to exclude any of his earnings with the Vikings from interim earnings.

[4] In adopting the judge's finding that McCullum abandoned his search for comparable interim employment in 1985, we find it unnecessary to decide whether the judge correctly analyzed the Board's decisions in *American Bottling Co*., 116 NLRB 1303, 1307 (1956), and *Arlington Hotel Co*., 287 NLRB 851, 853 (1987), enf. denied 876 F.2d 678 (8th Cir. 1989), on remand 297 NLRB 436 (1989). A finding of abandonment is warranted by both of those authorities.

[5] Walsh testified that most of his efforts were made by telephone; thus, there were few records that could have established the dates of his contacts with greater accuracy.

Thus, Walsh could not recall specifically having made contacts on behalf of McCullum during the fourth quarter of 1984. For that reason, and because of Walsh's sympathy toward McCullum, the judge found that the Respondent had pursued this matter as far as it could reasonably have been expected to at the hearing, and had carried its burden of showing that Walsh's efforts to find football employment for McCullum had ceased by the end of September 1984.

The General Counsel argues that the judge's interpretation of Walsh's statement that he continued his efforts on McCullum's behalf ''into the fall'' as meaning no later than September is arbitrary and unsupported. The General Counsel also stresses that the standard used by the Board in assaying efforts by backpay claimants to find interim employment is that of reasonable diligence. According to the General Counsel, McCullum met that standard. Thus, Walsh had contacted many NFL teams during the summer to inform them of McCullum's availability. By the General Counsel's lights, Walsh thereafter reasonably waited in the hope of a break, instead of making repeated calls to the same people, reiterating the same message. In that sense, the General Counsel argues, McCullum was somewhat like an employee who registers for referral at a hiring hall: once he had made his availability known, there was little point in repeating the effort.

We agree with the General Counsel. We find, as did the judge, that McCullum (through Walsh) made reasonably diligent efforts to find football employment through the third quarter of 1984, and that his pro forma announcement of retirement in a letter to the Vikings did not constitute an actual withdrawal from the professional football labor market.[6] We next note that, even if Walsh actually made no additional contacts on McCullum's behalf after September, that fact, by itself, would not compel the conclusion that McCullum abandoned his search for football employment beginning in October. As the Board has stated,

> From the fact alone that in a given quarter a discriminatee has made no specific job application, it does not necessarily follow that the discriminatee during that particular quarter has abandoned efforts to find suitable employment and in effect has withdrawn from the labor market. A discriminatee who has otherwise made reasonable efforts to seek out new employment is not required in each specific quarter to repeat job applications which from her past efforts she knows are foredoomed to futility in order to protect her claim of backpay for that particular quarter. Rather, the entire backpay period must be scrutinized to determine whether throughout that period there was, in the light of all surrounding circumstances, a reasonable continuing search such as to foreclose a finding of willful loss.

Cornwell Co., 171 NLRB 342, 343 (1968).

Applying this principle to the facts of this case, we find, contrary to the judge, that the Respondent has not shown that McCullum effectively removed himself from the professional football labor market in the fourth quarter of 1984. Thus, Walsh testified that he had contacted numerous NFL teams on McCullum's behalf during the previous two quarters.[7] In addition, the record indicates that even the teams that Walsh did not approach knew of McCullum's availability, because when a player is released, the action is reflected on the daily ''waiver wire,'' which goes to all NFL teams. In these circumstances, we find that Walsh did all that, in his judgment, could be done to market McCullum to NFL teams for the 1984 regular season, because all the teams were aware that McCullum was available, and Walsh had contacted directly the teams he thought would be most likely to offer McCullum a position. At that point, as the General Counsel suggests, it was not unreasonable for McCullum to wait and see what might develop, at least for the remainder of the 1984 season.[8] We therefore find that McCullum's conduct during the fourth quarter of 1984, viewed in the context of his earlier efforts, was consistent with a reasonable continuing search for employment as a wide receiver, and we shall award him backpay for that period.[9]

In the amended backpay specification, the General Counsel claims gross backpay from football for the fourth quarter of 1984 amounting to $146,300 for 11 regular season games, $6000 for the wild-card game, and $10,000 for the divisional playoff game—a total of

[6] As the judge found, giving such notice at that time was necessary to avoid a significant delay in obtaining severance pay. According to established practice, McCullum could have revoked the notice had he received a contract offer from an NFL team.

[7] Just how many teams Walsh contacted is not reflected in the record. Walsh specifically identified eight teams that he approached, and testified that he was sure there were others. He also said that some of the individuals with whom he spoke suggested other teams that might have a place for McCullum, and that he followed up on those suggestions.

[8] In this regard, we reject the judge's suggestion that, because injuries invariably create opportunities for unsigned players to obtain positions in midseason, it was incumbent on McCullum to make additional efforts to obtain employment during the course of the 1984 season. As we have noted, all the teams in the NFL already knew that McCullum was available. Moreover, the Respondent, who has the burden of proof on this issue, made no attempt to cross-examine Walsh concerning any efforts he may have made in response to reports of injuries. Indeed, some of his contacts may have been made on that basis, although he did not so testify.

[9] Member Raudabaugh would affirm the judge's finding that McCullum did not continue his search for employment beyond the third quarter of 1984. Insofar as the record shows, McCullum's agent sought employment for McCullum during the third quarter but not during the fourth quarter. The majority believes that McCullum's agent, having previously informed various teams of McCullum's availability, could sit back and wait for those teams to contact him. However, given McCullum's announced retirement in August 1984, Member Raudabaugh believes that it was incumbent on McCullum or his agent to apprise these teams that the retirement did not mean that McCullum was no longer interested in playing professional football and that, notwithstanding the retirement, he was still actively seeking employment as a football player.

$162,300, offset by no interim earnings. In its posthearing brief, the Respondent abandoned any argument against the General Counsel's method of estimating gross backpay for 1984, and now contends only that no backpay should be awarded for that year. That being the case, we shall award McCullum $162,300 in additional backpay for the fourth quarter of 1984, an amount which, added to the award of $134,899 approved by the judge, and the $4307 we have awarded for the first quarter of 1983, brings the total net backpay award to $301,506, plus interest.[10]

ORDER

The National Labor Relations Board orders that the Respondent, Elmer Nordstrom, Managing Partner, et al. d/b/a Seattle Seahawks and SSI, Incorporated d/b/a Seattle Seahawks, a successor in interest, Seattle, Washington, its officers, agents, successors, and assigns, shall make Samuel C. McCullum whole by paying him $301,506, plus interest to be computed in the manner set forth in the Board's Decision and Order of February 8, 1989.

[10] Any additional amounts due for increased severance and early retirement pay, or for increased pension payment eligibility, shall be determined as recommended by the judge in the last paragraph of his decision.

James C. Sand, for the General Counsel.
Robert A. Blackstone and *James B. Noel (Davis Wright Tremaine)*, of Seattle, Washington, appearing for the Respondent.
Jeffrey R. Walsh (Henning, Walsh & King), of San Francisco, California, appearing for Claimant McCullum.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Seattle, Washington, on June 26 through 29 and on July 6, 1990, based on a backpay specification and notice of hearing issued by the Regional Director for Region 19 of the National Labor Relations Board (the Board), on April 27, 1990, and on an amended backpay specification and notice of hearing issued by the Acting Regional Director for Region 19 of the Board on May 18, 1990, which were, in turn, based on a Decision and Order issued by the Board on February 8, 1989,[1] and enforced by the United States Court of Appeals for the Second Circuit by summary order filed on September 18, 1989. Based on the entire record,[2] on the briefs filed on behalf of the parties,[3] and on my observation of the demeanor of the witnesses, I make the following

[1] 292 NLRB 899.

[2] The General Counsel's unopposed motion to correct transcript is hereby granted, as described therein.

[3] I grant Respondent's motion to strike portions of the General Counsel's posthearing brief to the extent that it, and the substitute appendices to it, add evidence to that adduced prior to the close of the hearing. Since I have reviewed the transcript and exhibits, and rely exclusively on them in reaching my conclusions, I see no need to address the subject further.

FINDINGS OF FACT

I. BACKGROUND AND ISSUES

After having been drafted in 1974 by Minnesota, wide receiver Samuel C. McCullum played for the Vikings during that season and the following one. In 1976 he was selected in an expansion draft by the newly formed Seattle Seahawk franchise (Respondent), for whom he played continuously until Tuesday, September 7, 1982, when he was waived. In its Decision and Order, enforced by the Second Circuit Court of Appeals, the Board affirmed the underlying conclusion of Administrative Law Judge Bernard Ries that the waiver had been unlawfully motivated by McCullum's protected activity on behalf of the National Football League Players Association (NFLPA), the bargaining agent for those players.

Almost immediately after having been waived, McCullum was offered an opportunity to again sign a playing contract with Minnesota. However, he chose instead to attempt to become a member of the Los Angeles Raiders, thereby effectively foregoing the opportunity to be activated and paid by the Vikings for their scheduled league opener on September 12. 1982. However, after a tryout on Friday, September 10, 1982, the Raiders decided not to offer a contract to McCullum. Following a telephone conversation with then-Minnesota Head Coach Bud Grant, McCullum signed two 1-year contracts—one for the 1982 season and the other for the 1983 season—with the Vikings in time to be activated and paid for the second scheduled regular season game. Each contract was identical in salary to the amounts of McCullum's 1982 and 1982 contracts with Respondent. Moreover, McCullum then played for Minnesota in 1982 and 1983, with the result that he suffered no loss in regular season salary during those two seasons, save for the loss of that portion of his 1982 salary allocable to the first league game on Sunday, September 12, 1982, played after he had been waived by Respondent, but before he had signed with the Vikings. Respondent argues that McCullum is not entitled to backpay for that game, because his initial rejection of the Vikings' offer, in favor of attempting to become a member of the Raiders, constituted a willful loss of earnings.

Respondent further argues that McCullum would not have survived to become a member of its 1983 team due to a coaching change. After the 1982 season concluded with a losing record, Respondent contracted with Charles Robert Knox, who became its head coach in January 1983. As described in greater detail in section II, supra, Knox made changes in Respondent's playing system and some personnel changes before the 1983 playing season commenced. Despite these changes, the General Counsel contends that the evidence is not sufficient to establish that Knox would have waived McCullum in 1983, had the latter been a member of the team at that time that Knox became its head coach.

On February 1, 1984, McCullum's second 1-year contract with Minnesota expired. Efforts were made by the Vikings and by McCullum to negotiate a playing contract for, at least, the 1984 season. Ultimately, they were unsuccessful and McCullum was released by the Vikings on May 30, 1984, with the result that he became a free agent. He made no personal efforts to sign a contract with another team, but instead authorized his agent, Robert Walsh, to locate a team willing to retain McCullum's services, or at least to offer him a tryout. Walsh testified that throughout the summer and

into the fall he contacted officials from a number of National Football League (NFL) teams in an effort to accomplish one or the other of those objectives. However, those efforts were unsuccessful. Walsh admitted that at no point did he make any contacts on McCullum's behalf with teams in the United States Football League (USFL) or in the Canadian Football League (CFL). Walsh also admitted that no further efforts were made by him to obtain football employment for McCullum after the fall of 1984. However, he and McCullum continued efforts to secure nonfootball-playing employment for the latter. As a result, in March 1985. McCullum secured employment as director of the traffic safety commission of the State of Washington. In the interim, by letter dated August 28, 1984, McCullum notified the Vikings that he was retiring from, and had no intention of returning to play, professional football.

The General Counsel contends that none of the events enumerated in the preceding paragraph served to terminate the backpay period earlier than at the conclusion of the 1985 playing season when, concedes the General Counsel. McCullum likely would have retired as a professional football player. Conversely, Respondent argues that McCullum incurred a willful loss of earnings when he failed to initiate efforts to secure employment with other teams after his contract with Minnesota had expired on February 1, 1984. Furthermore, Respondent argues that McCullum's inability to obtain even a tryout offer, once Walsh did initiate efforts in June 1984, demonstrates that McCullum was no longer capable of playing professional football, with the result that the backpay period should terminate at that point. Alternatively, Respondent contends that the backpay period should terminate on August 28, 1984, when McCullum gave notice that he was retiring from professional football. Finally, argues Respondent, if the backpay period survived these events, the cessation of further efforts to secure football employment for McCullum in the fall of 1984 should constitute a willful loss of earnings that bars backpay for the remainder of whatever backpay period may have continued through the rest of 1984 and into 1985.

Aside from the foregoing issues, pertaining to the duration of the backpay period and the adequacy of McCullum's search for interim employment, several additional issues are posed with relation to the calculation of net backpay: whether the backpay period should be segmented into semiannual or calendar quarterly periods, and whether certain items should be included or excluded from gross backpay or interim earnings.

For the reasons set forth post, I conclude that Respondent has failed to satisfy its burden of establishing that McCullum would have been cut at some point prior to completion of the 1985 season, had he not been unlawfully waived on September 7, 1982, but I also conclude that McCullum incurred a willful loss of earnings after the third calendar quarter of 1984 by discontinuing his search for interim employment as a wide receiver.

Finally, it is undisputed that in September 1988, SSI, Incorporated purchased all right, title, and interest in the franchise for the Seattle Seahawks football team, together with all property, equipment, player contracts, and other appurtenant property rights, with full knowledge of the potential liability arising from the unlawful waiver of McCullum, and it has continued operation of the team since that time without interruption, with the result that it is jointly and severally liable for the amounts due as net backpay.

II. DURATION OF THE BACKPAY PERIOD

As a basic proposition, to toll the backpay period, ''a full and unconditional offer of reinstatement to the employee's former position is required.'' *Oil Workers v. NLRB*, 547 F.2d 598, 601 fn. 3 (D.C. Cir. 1976), cert. denied 429 U.S. 1078 (1977). Yet, few general legal propositions are without limitation. The above-quoted one is no exception. For example, ''it is settled that the Board must consider, in computing a backpay award. whether the employer would have work available for the discriminatee had the unfair labor practice not occurred.'' (Citation omitted.) *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 175 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). Here, there hardly could be a dispute regarding Respondent's continued employment of wide receivers after September 7, 1982. But Respondent contends that from 1983 onward, receivers other than McCullum would have proven better at that position and, as a result. McCullum would have been waived or released in favor of them. However, it is Respondent who bears ''the burden of going forward with evidence of job availability,'' id. at 176, and a preponderance of the evidence does not support the contention that McCullum would not have been retained by Respondent as a wide receiver after the 1982 season, absent its unlawful waiver of him on September 7, 1982.

In this regard, a most illuminating explanation regarding player retention was provided by San Diego Charger General Manager Bobby Beathard, who testified that,

> in my experience [with] teams which I've been with that have had coaching changes, the new coach . . . evaluates the squad. . . . If there's a question. then they would rather have the player be beaten out by someone new or maybe there isn't anyone to take his place at the time and we wait until we get somebody else. But for the most part the coaches I've been around act pretty much the game when there is a change.

This explanation was augmented by Respondent's president and general manager, Tom Flores, formerly a successful head coach:

> Usually when a coach comes in, the things that change are the philosophy of the team, the philosophy of how you're going to structure the team, the types of players that you'll want, and the way you do business. Those three things always change when a new coach comes in. Very Rarely—unless he's elevated within the system. But if he's an outsider, he brings his staff with him, and then you will see an influx of other types of players that he wants. And in some cases, some of his old players will come with him because he's more comfortable with them and they also know the system. They know the system, therefore he's going to bring the system and the philosophy with him, and he's going to try to bring some of those players with him that are leaders, that are good players, even if they only have a year or two left.

Beathard agreed that ''coaches have a tendency to keep or geek players who played for them in previous years,'' and

Alan Webb, San Francisco Director of Pro Personnel, carried this familiarity theme a step further by agreeing that coaches ''[d]efinitely'' often sign players who have played good games against them. He illustrated that testimony with the example of James Scott, a receiver whom the 49ers had chosen to sign, in part, because ''he'd had a good game against the 49ers'' when playing for the Chicago Bears. Indeed, Flores testified that the Raiders had offered the above-mentioned 1982 tryout to McCullum on the basis of ''a pretty good game against us in 1979.'' In fact, in Respondent's game against the Raiders on December 16, 1979, McCullum had 8 receptions for 173 yards and 1 touchdown.

Consequently, based on this testimony, it can be concluded that, as a general proposition, coaches tend to seek out players whose performance is known to those coaches and, further, to stay with veteran players until beaten out by newcomers. Knox, in particular, was known as a coach who ''liked to go to people that had gone to war with him, as he would say.'' In fact, he acknowledged as much:

> obviously if we've coached a player before, he certainly would consider additional consideration in that we know what that player can do. We've coached him, and he's had exposure to our system and he can make the adjustments—numbering system, for example—much more readily and more quickly than someone else.

Of course, evaluations of particular players' abilities vary from coach to coach. As Webb explained succinctly, ''Somebody else may think he's wonderful and we think he's deteriorated.'' Beathard agreed: ''But with 28 teams, there's a lot of different evaluations of players, of each player.'' Specifically with reference to Steve Largent—characterized in the underlying decision as ''if not a superstar, not many light years away'' (292 NLRB at 910)—Beathard admitted that when evaluating his abilities while in college, ''We missed on Largent, to be honest with you.''

All of which becomes important in assessing how McCullum would have fared once Knox became Respondent's head coach. In the underlying decision, the Board agreed that, on September 12, 1982, Respondent had opened its regular season with four principal wide receivers: flankers Largent and Byron Walker and split ends Paul Johns and Roger Carr (292 NLRB at 916).[4] Aside from Largent's above-described ability, the Board agreed that Johns and Walker were young, speedy receivers who ''brought promise of future success to the team over the coming years'' (292 NLRB at 924), with the result ''that the General Counsel would not . . . have a sufficient case'' had Respondent's September 7, 1982 choice been between retaining McCullum or retaining either Johns or Walker. (Ibid.)

But the Board concluded that Respondent had not been confronted with that particular choice on that date. Instead, the choice had been between McCullum and Carr, who had been obtained by trade with the Colts on September 3, 1982—4 days before McCullum had been unlawfully waived. More importantly, Respondent would not have been faced even with that choice had it not been unlawfully motivated by the intention of waiving McCullum because of the latter's protected activity. ''Respondent simply has not shown that the acquisition of Roger Carr on September 3 would have occurred even in the absence of the animus . . . against McCullum as an outspoken representative of union sentiment on the team.'' (at 9.) In short, the acquisition of Carr had been an integral facet of Respondent's unlawful plan to waive McCullum and, absent that unlawful intention, there is no evidence that Respondent would have acquired Carr.

Nor is there a basis for concluding that, absent the unlawfully motivated waiver on September 7, 1982, McCullum would not have completed the 1982 season with Respondent. Certainly the latter has not contended that some lawful reason arose that would have led it to waive McCullum during the course of the 1982 season. Moreover, statistically McCullum's 1982 record was not that dissimilar from the performances of Respondent's split ends during that particular season. Thus, Johns had 15 receptions for 234 total yards. 15.6 average yards per catch, and 1 touchdown. Carr had 15 receptions for 265 total yards, 17.7 average yards per catch, and 2 touchdowns. By contrast, playing for a different team, with a system that was new to him—and unable to play as many regular season games as Johns and Carr, due to the belated waiver by Respondent and signing by the Vikings—McCullum had 12 receptions for 131 total yards, 10.9 average yards per catch, and no touchdowns.

While impressive to fans and the media, statistics are not the sole measure of the merit of a wide receiver's ability or performance. Virtually all of Respondent's witnesses cautioned that statistics were not necessarily a reliable criterion of a receiver's worth to a team. Knox, himself, explained:

> And certainly being a wide receiver, there are a number of things that you have to do other than catch the football, catching the ball being very important to inside, outside, deep blocking, certainly, at the point of attack, away from the point of attack. And sometimes statistics can be very, very misleading because everybody wants to quote a wide receiver catches so many passes. But what did he do on the other plays? Your end plays 60, 65 offensive plays a game, and a guy catches two balls a game. Does that mean that he didn't do anything for the 58 out of the other 60 plays?
>
> How many time did you run the football? If you run the football 30 percent of the time, he's got an assignment on very play, whether he's at the point of the attack or away from the point of attack. And how did he do it? Did he get his man or did he miss his man, did he have a missed assignment and all of these things. . . . And he's got a specific assignment to do, and he either did it or he didn't do it.

So far as the evidence discloses, McCullum displayed no deficiency in any of these other aspects of wide receiving during his 1982 performance for the Vikings. To the contrary, of that season's performance by McCullum, then-Viking Head Coach Bud Grant was quoted as having said, ''Getting Sam McCullum was the best thing we could have done. . . . Sam brings to us the kind of intelligence and experience that you must have to play the position. He also is

[4] This does not mean that they were the lone wide receivers appearing on Respondent's roster. As is true in every season, Respondent's 1982 roster discloses the presence, at least from time to time, of other wide receivers. However, in this proceeding, and apparently in the underlying one, the parties concentrated on the principal players for that position. Others were carried for spot duty and, in some cases, because of an ability to perform in particular situations, not necessarily related to receiving, such as on special teams.

a good athlete and I don't see any diminishing of his skills in the immediate future.'' (292 NLRB at 915.) There is no evidence that would support a conclusion that McCullum would have performed less skillfully for Respondent in 1982. Accordingly, there is no basis for concluding that he would not have remained a wide receiver for Respondent throughout that season.

Respondent's principal argument is directed to the 1983 season: that McCullum would not have been capable of satisfying Knox's standards for playing the wide receiving position. However, the evidence simply does not support that argument.

When he took over as Respondent's head coach, testified Knox, he had, ''wanted to take a look at the existing players, take a look at the whole situation, analyze it and then make some decisions as to what areas we needed to strengthen our football team and how we might go about doing that,'' feeling that ''we had to effect a change in the fact that we expected to win, and we wanted to win, and the coaching staff was going to insist and demand that the player give the very, very best that he had to give within the God-given talent that he had.'' Toward that end, Knox testified that he interviewed all or almost all of the former assistant coaches, retaining two of them, and reviewed game films from Respondent's 1982 and 1981 seasons to ascertain ''everything that was involved in it that we could get off the film.'' More specifically, he explained that while ''not knowing totally what [a particular] player had been told to do. and not knowing what the coaching situation had been,'' only some tentative conclusions could be reached. He ''tried to give everybody the benefit of the doubt,'' and, as a result, he took no final action based solely on film review. Rather, he ''[b]asically'' brought all of the 1982 veteran players into May minicamp and summer training camp to give them a shot at proving themselves. There is no basis in the record for concluding that McCullum would not have been among them, had he not been unlawfully waived before the preceding session had commenced.

One course that Knox did pursue was to attempt to sign certain veteran players who had previously played on teams that he had coached, but who had not been members of Respondent's 1982 team. Significantly, however, prior to commencement of training camp on July 20, 1983, Knox did not sign—and, so far as the record discloses, did not attempt to sign—veteran wide receivers who had played elsewhere for him. As to Respondent's veteran wide receivers, aside from Carr—who had played for a team, the Colts, in the same division as the Buffalo team that Knox had coached from 1978 through 1982—Knox had only stale experience, at best, with any of them. In 1976, he had coached the Rams to a 45 to 6 victory over Respondent. Although both Largent and McCullum had been members of Respondent's 1976 team. Knox gave no testimony concerning his impressions, if any, of their play in that game. Aside from that single game, Knox had no exposure to Seattle in the intervening 7 years. By the time that the Rams next played Respondent, Knox had become head coach in Buffalo. And the most recent Bills' game with Respondent, prior to 1983, had occurred in 1977, the year before Knox became the Buffalo head coach. As a result, so far as the evidence discloses, aside from Carr, Knox's initial evaluations of Respondent's veteran wide receivers had to be based exclusively on viewing films of them. He testified that he had been impressed with Largent's great talent and the way that he played the game; had felt that Johns was a ''good, solid productive football player,'' with great speed and ability to run after catching the ball and with real potential; and, had viewed Walker as a tall receiver who made a lot of clutch catches and made the right decisions.

However, Knox's evaluation of Carr had been a negative one. He testified that Carr ''was a declining football player'' who ''was not the kind of football player that I wanted on our football team.'' Yet, as pointed out in the preceding paragraph, there is no evidence that Knox took any action to replace Carr by signing a veteran receiver during the late winter, spring or early summer of 1983. So far as the evidence shows, as training camp opened on July 20, 1983, Knox was fully prepared to ''got to war'' with Carr as his second split end and fourth principal wide receiver.

That conclusion is only fortified by examination of Respondent's choices in the 1983 college draft. Respondent selected only a single wide receiver: Chris Castor. But there is no basis for concluding that Respondent had intended that Castor become one of its principal receivers in 1983. Knox described him only as a receiver with ''tremendous potential'' who ''was the kind of player that you would like to develop and hope that he would come on and live up to your expectations, that you wanted to give him an opportunity to do that.'' Significantly, Knox's only general comment concerning Respondent's wide receiver corps, as it existed when he had become head coach, was that he felt that it lacked depth. Given that feeling and his observations concerning Castor, the only possible conclusion is that Castor was drafted with a view to the future—to seasons after the 1983 one—and not as a receiver who could play an immediate principal role for Respondent. Indeed, there is no evidence that he did so.

In the end, Knox did not ''go to war'' in 1983 with Carr. However, that occurred not because of any choice by Knox. Rather, Carr forced Respondent's hand by refusing to report to training camp, after having earlier refused to report for minicamp, in an effort to extract a higher salary. When Carr did not report on July 20, 1983, Knox testified that he had contacted Harold Jackson on Sunday, July 24, 1983, and had invited him to Respondent's training camp. Thereafter, Jackson reported, signing a playing contract with Respondent and remaining on Respondent's roster for the entire 1983 season.

There is no showing that, had Respondent not unlawfully waived him a year earlier, McCullum would have held out, as had Carr. Asked about his evaluation of McCullum, Knox testified that solely on the basis of his review of films from Respondent's 1981 games, he had not been impressed by McCullum's play and had felt that Respondent had not made a mistake by waiving him. However, it has been determined ag a matter of law that Respondent waived McCullum in 1982 not because of inadequate performance, but rather to retaliate against him for engaging in protected activity. Moreover, McCullum played impressively for Minnesota in 1982, as illustrated by then-Coach Grant's above-quoted remarks. Consequently, not only were the performances viewed by Knox in the 1981 films relatively stale, given the fact of McCullum's intervening 1982 season performance, but even if McCullum's 1981 performance truly had left Knox unimpressed, there is no basis for concluding that Knox

would not have given greater weight to the more recent impressive performance of McCullum in 1982. Indeed, the fact that Knox brought into training camp all of the 1982 veterans, still willing and able to play in 1983, demonstrates that he was not disposed to evaluate players for retention exclusively on the basis of film review of their performance even from their most recent season—an option not available to Knox with respect to McCullum because of Respondent's earlier unlawful waiver of him.[5]

The choice of Harold Jackson as Respondent's fourth primary wide receiver is not without additional significance. He was considerably older than McCullum, having begun his career in 1968. True, he had played for Knox with the Rams and, to that extent, satisfied the above-noted coaching desire for familiarity with the coach's playing system. However, he last had played for Knox in 1977. Consequently, his experience with the latter's system was not a recent one. Moreover, though Knox left the Rams after the 1977 season and Jackson had been traded to New England after that same season, there is no evidence that Knox had ever made any particular effort to secure Jackson's services during succeeding seasons. Yet, Jackson clearly became available after the 1982 season when New England released him and, again, he became available in the fall of 1982 when, after having signed with San Diego on July 15, 1982, he was released by the Chargers on September 6, 1982. But there is no evidence that Knox attempted to sign him to play for Buffalo at either time in 1982. Of equal significance is the fact that Jackson did sign with Minnesota on December 30, 1982, while McCullum had been a member of the Vikings. However, the Vikings released Jackson after the 1982 season, while retaining McCullum as a wide receiver for the 1983 season.

In the course of describing his actions after becoming Respondent's head coach, Knox specifically pointed out that ''you can't just wipe out an entire football team.'' Although Jackson had previously played for him, the evidence shows no more than that Knox sought him out solely because Carr had chosen not to report and, accordingly, a gap was created in Respondent's receiving corps—a gap which Jackson happened to be immediately available to plug. As set forth above, while he felt that Carr ''was not the kind of football player that I wanted on our football team,'' there is no evidence of efforts to replace Carr before training camp and, so far as the evidence shows, Knox had been fully prepared to accept Carr as one of Respondent's principal receivers during the 1983 season. However, Carr would not have been on Respondent's 1982 roster had Respondent not formulated a plan to waive McCullum for unlawful reasons. There is no specific evidence that Knox would have been less disposed to ''go to war'' with McCullum than he had been willing to do with Carr. Therefore, I conclude that Respondent has failed to meet its burden of going forward with evidence that there would have been no position available for McCullum among its 1983 receiving corps.

Nor will the evidence support a contrary conclusion concerning the 1984 season. Jackson did not return. Consistent with my conclusion in the immediately preceding paragraph, nothing would have occurred during the 1983 season that would have rendered McCullum unable to complete that season playing for Respondent, as he had with Minnesota, and be available to play for it in 1984. Of course, had McCullum been able to play for Respondent in 1983, he would have acquired a year of playing experience under Knox's system.

That Respondent had been in need of experienced wide receivers in 1984 was graphically shown by the fact that, despite having exercised a second round draft choice for Michigan State wide receiver Daryl Turner, Respondent signed 7-year veteran wide receiver Dwight Scales. While he had played for Knox in 1976 and 1977, with the Rams, Scales had not played professional football in 1980 and in 1983 had played in but seven games, catching only two passes. Asked about his reasons for having signed Scales, Knox ultimately conceded that Scales had been ''there, prepared to play as a backup. . . . He was just a player that we had a need for players to fill that particular role.'' Yet, at no point did Knox advance any particularized testimony that could form a basis for concluding that McCullum could not have filled that role.

As set forth in section I, supra, McCullum had been released by Minnesota on May 30, 1984. Thereafter, no other team had been disposed to offer him so much as a tryout. In light of these facts, Respondent argues that McCullum no longer had been capable of playing professional football after the 1983 season. Yet, in the context of this record, that conclusion is not so readily reached. In the first place, there is no evidence that Minnesota had released McCullum because its coaches no longer believed that he could continue playing football. To the contrary, after the 1983 season the Vikings had made two salary offers to McCullum and, under the rules then governing contract offers, had McCullum accepted the second one, Minnesota would have been obliged to execute a contract with him. So far as the evidence shows, the Vikings were fully prepared to do so, had McCullum accepted. But, he did not, holding out for a higher salary, instead. So far as the record discloses, it had been this difference in salary that had led Minnesota to waive him. Significantly, at no point did Respondent contend, much less prove, that it would have been similarly unwilling to contract with a veteran wide receiver for the salary amount that McCullum had been seeking from the Vikings in 1984.

Second, as Webb and Beathard explained, evaluations of player capabilities vary from coach to coach and from team to team, with the result that some organizations will choose a player whom others feel is no longer capable of playing the game. A clear illustration of that fact is Respondent's signing of Harold Jackson. He had played but a single game since the 1981 season had concluded. Between then and July of 1983, when he signed a contract with Respondent, Jackson had been released by New England, signed by San Diego

[5] This was the reasoning that primarily led me to sustain the objections to questioning of Knox concerning his opinion as to whether McCullum would have made Respondent's 1983 roster. Given Knox's unfamiliarity with McCullum's career performance, the relative staleness of the 1981 performances in the films viewed by Knox, the fact that McCullum had performed impressively during the intervening 1982 season, and Knox's demonstrated unwillingness to make player retention decisions without viewing actual performance in training camp, his opinion as to whether McCullum could have played for Respondent in 1983 simply was neither based on his own demonstrated standard for making such an evaluation nor, in the final analysis, was it ''helpful'' to determining whether or not McCullum could have succeeded in making Respondent's team in 1983. See Fed.R.Evid. 701 and 703. Of course, a quite different result might have occurred had that opinion been sought after Knox had viewed films of McCullum's 1982 performances or, even, had he been asked for a detailed breakdown and analysis of McCullum's performance characteristics, consistent with the above-quoted description of the duties called for by the wide receiver position, rather than simply having been asked for a generalized and conclusionary opinion based on a general viewing of unidentified films for an undescribed and undetailed amount of time.

during the preseason but released before the regular season commenced, and signed to play in a single game for Minnesota at the end of the 1982 season. Yet, Knox chose to sign him as one of Respondent's principal receivers for the 1983 season. Of course, Jackson—and Scales, as well—had been familiar with Knox's system when they had been signed by Respondent. However. as pointed out above, not only would McCullum have acquired similar experience had he been able to play for Respondent in 1983, but his experience under Knox's system would have been of more recent vintage than that of either Jackson or Scales.

Moreover, the testimony of Beathard quoted at the outset of this subjection must be considered: if McCullum had been a returning veteran in 1984, there would have been a natural tendency for Knox to retain him until someone new could prove a better split end and replace him. Respondent has presented no evidence that either Jackson or Scales could have done so in 1983 and 1984, respectively. Nor, for that matter, has it shown that Castor would have been capable of doing so in 1984. Indeed, Respondent has provided no evidence whatsoever that Respondent would even have signed Scales in 1984 if there already had been a fourth veteran principal wide receiver, along with Largent, Johns, and Walker.

In sum, despite the failure of any team to offer McCullum even a tryout in 1984, Respondent has presented no evidence that would provide a basis for concluding that, as a veteran familiar with Knox's system, McCullum would not have been retained as a wide receiver in 1984, at least to ''fill [the backup wide receiver] role,'' for which Knox admitted that Respondent then needed a player. Further, there is no basis for concluding that McCullum would not have completed the 1984 season as a member of Respondent's wide receiving corps. While split end Turner blossomed into Respondent's second leading receiver, Johns suffered a career-ending injury, thereby leaving Respondent especially deficient in split ends, McCullum's position. Castor appears not to have developed as Knox had hoped that he would do. Scales caught but two passes; there is no evidence that he had performed with distinction any of the other wide receiver functions that Knox had described, as quoted above. In contrast, there is no particularized testimony that would show that McCullum could not have done the latter. Consequently, there is no basis for a conclusion that McCullum would not have played the full 1984 season for Respondent.

Nor is there a basis for concluding that McCullum would not have been retained for and completed the 1985 season with Respondent. Turner had become the starting split end, but Respondent's receiving situation was so thin that it traded a promising young tight end for Byron Franklin, a wide receiver drafted by Buffalo when Knox had been head coach there. In addition, Respondent had utilized its third-round draft choice to select Danny Greene as a wide receiver. However, these is no basis for concluding that their presence would likely have deprived McCullum of a place on the 1985 roster, since neither Johns nor Scales returned for that season and Castor failed to make the team.

During the course of seasonal play, both Franklin and rookie Greene suffered injuries. Eventually, Respondent was obliged to trade for Raymond Butler, a receiver who had played for the Colts and who had impressed Knox when doing so in games against Buffalo. At no point did Respondent provide specific evidence that could provide a basis for concluding that, had he been able to play for Respondent in 1983 and 1984, McCullum would not have been able to continue doing so throughout the 1985 season. Therefore, I conclude that the duration of the backpay period extends from September 7, 1982, through Respondent's 1985 season.

III. THE ADEQUACY OF MCCULLUM'S SEARCH FOR INTERIM EMPLOYMENT

The backpay, or make whole, remedy is intended both to ''reimburse[] the innocent employee for the actual losses which he had suffered as a direct result of the employer's improper conduct'' and to ''further[] the public interest advanced by the deterrence of such illegal acts.'' (Footnote omitted.) *NLRB v. Madison Courier*, 472 F.2d 1307, 1316 (D.C. Cir. 1972). However, a claimant must exert reasonable efforts to become and to remain employed throughout the backpay period, ''not so much [for] minimization of damages as [to promote] the healthy policy of promoting production and employment.'' *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 200 (1941). That is, the claimant's ''duty is based both on the doctrine of mitigation of damages and on the policy of promoting production and employment.'' (Citations omitted.) *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569, 575 (5th Cir. 1966).

As a result, a claimant ''is not entitled to backpay to the extent that he fails to remain in the labor market . . . [or] fails diligently to search for alternative work.'' *NLRB v. Mastro Plastics Corp*., supra, 354 F.2d at 174 fn. 3. Accord: *NLRB v. Madison Courier*, supra, 472 F.2d at 1317; *Knickerbocker Plastic Co*., 132 NLRB 1209, 1219 (1961). Furthermore, a claimant does not satisfy that responsibility simply by accepting whatever interim employment may happen to come along. ''When a discriminatee has been improperly deprived of his employment position, he is under the recognized duty to make reasonable efforts to locate interim work comparable to his denied position and commensurate with his particular background and experience.'' (Footnote omitted.) *NLRB v. Madison Courier*, supra, 472 F.2d at 1325. Accord: *Arlington Hotel Co. v. NLRB*, 876 F.2d 678, 680 (8th Cir. 1989); *NLRB v. Westin Hotel*, 758 F.2d 1126, 1129–1130 (6th Cir. 1985).

Respondent challenges the adequacy of McCullum's search for interim employment at essentially three points after September 7, 1982. First, as described in subsection I, supra, after having been waived on that date. McCullum was immediately offered a contract by the Minnesota Vikings. He declined that offer in favor of attempting to secure what he regarded as more meaningful employment with the Raiders. But his tryout with the latter failed to generate a contract offer and, after having been assured by then-Coach Grant that acceptance of the Minnesota offer would provide meaningful employment. McCullum signed with the Vikings. However, by initially having rejected that offer, in favor of pursuing employment with the Raiders, McCullum lost the opportunity to earn income that he otherwise would have received, had he accepted Minnesota's offer and been activated for the Vikings' first league game on September 12, 1982.

According to Respondent, the logs of that income was willful, because McCullum would have earned income for that game had he simply accepted Minnesota's offer, rather than seeking employment with the Raiders. However, the Board has long held that, ''the entire backpay period must

be scrutinized to determine whether throughout that period there was, in light of all surrounding circumstances, a reasonable continuing search such as to foreclose a finding of willful loss.'' *Cornwall Co*., 171 NLRB 342, 343 (1968). ''Because the ultimate test of the employee's efforts is whether they are consistent with the inclination to work and to be self-supporting, we approve the NLRB's policy of looking to the backpay period as a whole and not at isolated portions of that period.'' (Citations omitted.) *Kawasaki Motors v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988). Based on that principle, the Board has concluded that, ''a discriminatee is not required to work instantly,'' (citations omitted). *I.T.O. Corp. of Baltimore*, 265 NLRB 1322 (1982).

Applying those principles to McCullum's efforts during the week following his unlawful waiver by Respondent, there is no basis for concluding that, despite his initial rejection of Minnesota's offer, he had failed to display an ''inclination to work and to be self-supporting.'' *Kawasaki Motors v. NLRB*, supra. Because he believed that he had a better chance of securing a position and remaining with the Raiders, McCullum arranged for a tryout with that team. That tryout occurred within 3 days of his waiver by Respondent. There is no evidence whatsoever that his desire to play for the Raiders had not been a genuine one—no evidence that he did not fully intend to sign a playing contract, if offered, and play for the Raiders. Moreover, once he learned that a Raider offer would not be forthcoming, and after receiving Grant's assurance that he would have a meaningful opportunity to play with the Vikings, McCullum promptly signed a playing contract with Minnesota, 1 week to the day after having been waived by Respondent. In these circumstances, McCullum's initial rejection of Minnesota's offer cost him income from the initial game of the season, but it did not suffice to demonstrate a willful loss of earnings during the week between the waiver and execution of his contract with the Vikings.

Respondent next contends that McCullum incurred a willful loss of earnings by failing to seek a playing contract with teams other than the Vikings immediately on expiration of his contract with Minnesota on February 1, 1984. Testimony by McCullum, as well as other evidence, shows that because of the staffing process followed by teams to ensure full training camp rosters, McCullum would, perhaps, have been more readily able to secure a playing contract during the winter and early spring, than was the fact during the later months of June through August. However, before McCullum's contract had expired, Minnesota had tendered a ''qualifying offer'' to him. As a result, any salary amount that he negotiated with another team by April 15, 1984, under the rules then existing, would have been subject to Minnesota's right to match that offer. Even if the Vikings elected not to make a matching offer, Minnesota still would have been entitled to draft choice compensation from the team who signed McCullum. Further, absent such an offer by another team before April 15, 1984, McCullum was absolutely barred from being able to negotiate with a team other than Minnesota between that date and June 1, 1984, unless released by the Vikings, as occurred on May 30, 1984. Accordingly, between February 1 and May 30, 1984, McCullum was not an unfettered free agent and lacked an unrestricted right to seek employment with teams other than the Vikings.

More significantly, McCullum testified that, despite expiration of his contract on February 1, 1984, he had wanted to continue playing with the Vikings—had fully intended to negotiate and sign a new playing contract with that team. Furthermore, prior to May 30, 1984, there was no indication whatsoever that Minnesota was not of a like mind—did not fully intend to execute a new contract with McCullum.

Nothing inherent in expiration of a playing contract serves to indicate that a team does not intend to re-sign a veteran player. McCullum had received a qualifying offer from Minnesota by February 1, 1984. Further, after having received McCullum's initial salary demand, the Vikings countered with a higher offer, the so-called section 17 offer of 110 percent of McCullum's previous year's salary. Had that offer been accepted by McCullum, Minnesota would have been required to execute a playing contract with him for the ensuing season. So far as the evidence shows, the Vikings were fully prepared to do so. Moreover, McCullum's rejection of that offer did not end the negotiating process with the Vikings. Rather, negotiations continued through the spring of 1984. As a result, not only were McCullum's actions consistent with an ''inclination to work and to be fully self-supporting,'' id., during the upcoming football season, but there is no objective basis for concluding that there was any indication that he would not be able to do so as a member of the Vikings team, at least not prior to May 30, 1984. In these circumstances, the evidence will not support the conclusion that McCullum incurred a willful loss of earnings by failing to geek employment with teams other than Minnesota between February 1 and May 30, 1984.

Respondent's third contention of willful loss of earnings pertains to the period after McCullum had been released by Minnesota on May 30, 1984. As set forth in section I, supra, during the ensuing summer, agent Walsh contacted several NFL teams in an effort to secure a tryout invitation, if not an invitation to training camp, for his client. However, none was forthcoming. Walsh conceded that he had not contacted Respondent on McCullum's behalf, but it was Respondent who owed McCullum an offer of reinstatement. Accordingly, McCullum was not obliged to ''come back, hat in hand, and seek favorable consideration as [a] possible employee if [Respondent should have chosen to offer him a tryout].'' *Hydro-Dredge Accessory Co*., 215 NLRB 138, 139 (1974).

Nor did Walsh contact teams in either the USFL or CFL. Yet, by May 30, 1984, the USFL had completed its 1984 season, which was played in the spring. In contrast, the CFL played a summer–fall season, beginning in late July or early August and ending in November. Although it is conceivable that Walsh still might have located a CFL team willing to sign McCullum so close to commencement of seasonal play, Respondent has failed to show that Walsh actually could have done so. Aside from that omission, in the circumstances, Walsh's failure to contact a CFL team in 1984 is not fatal. The duty of mitigation does not require a claimant to exhaust every possible potential employment opportunity. Only a ''reasonable'' effort is required. See, e.g., *Southern Silk Mills*, 116 NLRB 769, 773 (1956). Accord: *NLRB v. Westin Hotel*, supra. McCullum had been released unexpectedly. His entire career had been in the NFL. Consequently, it was hardly illogical for him to believe that, given the abrupt notice of his need to locate employment, his best opportunity to secure immediate employment would be with teams in that league, most all of whom he had played against over the preceding 10 years. Inasmuch as Walsh con-

tacted a number of those teams through that summer, it cannot be said that his efforts were not reasonable simply because he did not contact teams in another league, as well. Accordingly, it cannot be said that a willful loss of earnings was incurred because he did not broaden the search for employment for McCullum during the summer months of 1984.

Respondent's perhaps principal contention is that McCullum retired altogether from playing professional football, and totally withdrew from the professional football players' labor market, by his resignation letter to the Vikings on August 28, 1984. As the preseason had progressed toward commencement of the 1984 regular season without prospect of an employment offer, McCullum had become concerned about his ability to support himself and his family. While severance pay was available for retiring players, if McCullum had delayed providing notice of retirement until after the first regular season game, under the rules then in force he would not have been eligible to begin receiving those payments before the third regular season game of 1985, more than a year in the future. Thus, he submitted the notice to obtain his severance payments without that delay. It had not been his intention to permanently retire, if he could later receive an offer to play.

It is undisputed that players were free to revoke such resignation notices if they were offered playing contracts after having submitted them. In fact, there is evidence that, in the past, some players actually had revoked resignation notices and signed playing contracts. Further, Walsh testified that he had continued seeking football employment for McCullum ''through the summer of that year [1984] and even into the fall.'' Such efforts would have extended beyond the date of McCullum's resignation letter to the Vikings. In these circumstances, I conclude that McCullum's resignation notice did not constitute a withdrawal from the professional football labor market on August 28, 1984, but instead had been submitted only as a vehicle for generating revenue because he had remained unemployed.

However, a contrary conclusion results from examination of subsequent events. As set forth at the beginning of this section, to mitigate the effects of an unfair labor practice, a claimant is required to seek not merely any interim employment that he happens on, but rather must seek interim employment ''comparable to his denied position and commensurate with his particular background and experience.'' *NLRB v. Madison Courier*, supra. McCullum had been a wide receiver for 10 seasons preceding his release by the Vikings. He seeks backpay under a gross backpay formula predicated upon continued employment in that occupation. Accordingly, to satisfy the mitigation duty applicable to him, he was obliged to continue seeking interim employment as a wide receiver. But that admittedly did not happen.

Although failure to exercise reasonable efforts to obtain equivalent interim employment is an affirmative defense, *NLRB v. Mastro Plastics Corp*., supra, 354 F.2d at 175, in that case the court continued by pointing out that ''information relevant to whether the discriminatee willfully incurred a loss of earnings is within the knowledge of the discriminatee, not the employer.'' (At 177.) Here, McCullum admitted that he had made no personal search for interim employment as a wide receiver, but had delegated responsibility for making that effort to his agent, Walsh. In turn, while the latter admitted that the best time to look for employment as a player is during the months of January through March, he conceded that he had no recollection of having contacted any NFL team on McCullum's behalf during those months nor during the remaining 9 months in 1985. Moreover, with respect to 1984, Walsh testified that he had made such contacts ''into the fall,'' but admitted that he did not ''remember how long we did.'' Accordingly, he was unable to recall having made any contacts for football employment during the final 3 months of 1984.

Short of calling very official of every NFL team in 1984, Walsh was the only individual from whom Respondent could have elicited information about the duration of the search for interim employment on McCullum's behalf. Though given the opportunity to do so, Walsh did not go much as claim that he had made an effort to contact even a single team on McCullum's behalf after the third calendar quarter of 1984, much less provide specific testimony regarding any such contact. In light of Walsh's role in 1984 and 1985 as McCullum's agent, and his obvious continued sympathy toward McCullum's position when testifying during his proceeding, I conclude that, in the circumstances, Respondent pursued this issue as far as was possible and, in light of the absence of even a generalized assertion of efforts to locate wide receiver employment after the third calendar quarter of 1984, satisfied its burden of establishing that efforts to seek interim employment for McCullum as a wide receiver ceased and, moreover, that they had ceased by the end of the third calendar quarter of 1984.

Of course, the General Counsel and McCullum argue that employment was difficult to locate by the time that Minnesota had released McCullum, in view of the ordinary procedure followed by teams to prepare for training camp, and, further, that McCullum had sought nonfootball-related interim employment throughout the last calendar quarter of 1984 and into 1985, resulting in his acceptance of the position of director of the state traffic safety commission. Yet, at no point did McCullum claim that either acceptance of that position or his general search for interim employment would have prevented him from accepting a playing contract, had one been offered to him in 1984 or 1985. To the contrary, he testified that he had continued to desire to play professional football and had never instructed his agent to give up trying to find an opportunity for him to do so. So far as the record discloses, despite efforts to locate nonfootball-related interim employment, Walsh was not prevented by those efforts from continuing concurrent efforts to locate employment for McCullum as a wide receiver. Accordingly, this is not a situation where a desperation search for any available employment, whatsoever, prevented the claimant from continuing to search for employment comparable to that from which he had been unlawfully waived by Respondent. Nevertheless, Walsh ceased making those efforts.

It is well settled that a claimant is entitled to lower his sights, ''by seeking less remunerative work after he [h]as unsuccessfully attempted for a reasonable period of time to locate interim employment comparable with his improperly denied position.'' *NLRB v. Madison Courier*, supra, 472 F.2d at 1321. But at no point has it been held that once a claimant's sights are lowered, that claimant is thereafter absolved altogether form accepting subsequently disclosed comparable employment nor, for that matter, from continuing to geek comparable interim employment to the extent that a general-

ized search for it does not disrupt a more realistic effort to locate less remunerative, but more certain, work. As concluded above, there is no evidence that the effort to locate nonfootball playing interim employment for McCullum had precluded Walsh from concurrently continuing to locate wide receiver employment for McCullum. Accordingly, McCullum's efforts to locate nonfootball-related interim employment did not justify abandonment of efforts to locate a wide receiver's position after the third calendar quarter of 1984.

Nor is it a more persuasive argument that football-related employment was more difficult to locate after the 1984 season had opened. True, the relevant job market is one circumstance that must be considered in evaluating the reasonableness of a claimant's search for interim employment. *NLRB v. Westin Hotel*, supra, 758 F.2d at 1129; *Rogers Furniture Sales*, 213 NLRB 834 (1974). Indeed, where a claimant actually seeks interim employment, the respondent fails to satisfy its affirmative burden if it ''present[s] no probative evidence that there were jobs available in the area . . . or that [the claimant] rejected suitable employment.'' *Neely's Car Clinic*, 255 NLRB 1420, 1421 (1981). But, as pointed out in subsection II, supra, in another context, few general principles are applied in absolute fashion and without limitation.

That limitation doctrine is no less applicable to a respondent's normal burden of showing available alternative employment in a context where, as here, the claimant abandons the search for comparable interim employment. Where that occurs, ''the circumstance of a scarcity of work and the possibility that none would have been found even with the use of diligence is irrelevant.'' *American Bottling Co*., 116 NLRB 1303, 1307 (1956). That particular limitation doctrine has been adopted specifically by the circuit courts of appeals. See, e.g., *NLRB v. Madison Courier*, supra, 472 F.2d at 1319. As a result, when the Board appeared to qualify the bright-line rule of *American Bottling*, by observing that there had actually been ''numerous, substantially equivalent job opportunities'' in that case, *Arlington Hotel Co*., 287 NLRB 851, 853 (1987), the Eighth Circuit Court of Appeals reversed the portion of the Board's decision containing that seeming qualification. *Arlington Hotel Co. v. NLRB*, 876 F.2d 678 (1989). The Board accepted the court's decision without further comment concerning the continued viability of the above-quoted portion of *America Bottling*. *Arlington Hotel Co*., 297 NLRB 436 (1989). In no other cage has the Board held, or even indicated, that the *American Bottling Co*. rule is no longer effective.

Of course, NFL teams did continue to employ wide receivers throughout their 1984 and 1985 seasons. Yet, no search for interim employment as a wide receiver was made on McCullum's behalf for most of the former nor for the entirety of the latter. True, by 1985 McCullum had not played football since the 1983 season, thereby leaving a 1-year gap in his playing career. Nevertheless, Walsh did not claim, and there is no other evidence showing, that McCullum's nonparticipation in 1984 seasonal play had motivated the admitted failure to make contacts with teams on McCullum's behalf for the 1985 season.

The evidence shows that similar gaps in a wide receiver's playing career have not precluded teams from signing them. As pointed out in section II, supra, Dwight Scales had resumed his career after not having played during the 1980 season. Similarly, after having not played during almost all of the 1982 season, Harold Jackson had been signed by the Vikings, for whom McCullum had been playing at that very time, to play in the final game of that season. Further, while Jackson had played but that single game during the 1982 season, the almost total 1-year gap in his career did not prevent Respondent from signing him for the 1983 season. Indeed, Beathard's own career was an example of persistence generating playing opportunities, notwithstanding periods of inactivity. He was signed out of college by the Redskins. But he had been waived before the season began and did not play for any team during that season. Nonetheless, he was signed by the Chargers before the next preseason. After he had been cut by the Chargers, once preseason games had been completed, Beathard did not play during that season nor during the following one. However, those two seasons of inaction did not prevent the Vikings from signing him thereafter.

No doubt McCullum's career was not enhanced by his failure to play during the 1984 season. But, of itself, a single season's inactivity would not have automatically precluded professional football teams from signing him for 1985 play, had he but made the effort to be signed, especially during the favorable months of January through March of that year. His own failure to seek being signed effectively precluded teams from considering whether or not to sign a contract with him, or to at least offer him a tryout.

During 1985, wide receivers were employed not only by NFL teams, but also by teams playing in the USFL and CFL. True, not all teams in the USFL had been financially stable and CFL teams were subject to a ceiling on the number of non-Canadian players that could be members of each team. Nevertheless, the fact remains that teams in both leagues played a full season in 1985. McCullum was not obliged to accept the financial risk of playing for an insolvent team. However, if some USFL teams had been experiencing financial difficulties. there is no evidence showing that every one of them had been unable, or even potentially unable, to pay its players that year. Yet, McCullum made no effort to secure so much as a tryout with any USFL team. Similarly, non-Canadians played on CFL teams during that league's 1985 season and there is no showing that McCullum could not have been one of them—had he but tried to do so. After all, the evidence shows that after having played for 14 seasons in the NFL, Fred Billetnikoff had been cut by the Raiders, but had gone on to play an additional season for the Montreal franchise in the CFL.

When he testified, McCullum, in effect, disparaged the USFL and CFL as leagues less prestigious than the NFL. In fact, that appeared, from his manner of testifying, to have been his true objection to playing for teams in either league. However, teams in both of those leagues employed wide receivers in 1985. There is no evidence that employment at that position in one league was not substantially comparable to playing wide receiver in the other two leagues. Neither the Board nor the courts of appeals have ever looked to the comparative prestige of the discharging and potential interim employer in determining that interim employment is not suitable. To the contrary, a claimant cannot validly decline commensurate interim employment simply because of ''personal convenience, preference, or accommodation,'' *Knickerbocker Plastic Co*., supra, 132 NLRB at 1214–1215, and a disregard of interim employment possibilities ''because those jobs did

not suit [the claimant's] convenience demonstrate that he would only have accepted work when he chose and as he pleased.'' *Continental Insurance Co*., 289 NLRB 579, 580 (1988).

In these circumstances, I conclude that there is evidence of the existence of opportunities for employment as a wide receiver in 1985, but that the evidence shows that McCullum made no effort to attempt to obtain a position as a wide receiver with any team in any league for that season. Consequently, during that year, he effectively abandoned professional football employment, thereby incurring a willful loss of earnings for 1985.

Furthermore, it cannot be said with any degree of certainty that McCullum would have confronted the 1985 season with a 1-year gap in his playing career, had he but continued searching for interim employment as a wide receiver during the final calendar quarter of 1984. True, the season already had been underway by that time. Consequently, each NFL team had selected the players that it desired, and could obtain, for its roster. However, McCullum was aware that no team progresses through its schedule free of injury to some of its players. As a result, every team maintains a list of players—the ready list, emergency list, hot list—to which it can look for replacement players. The record does show that a team prefers to replace injured players with ones who went through its training camp and could not survive the final cut, but are familiar with that team's system. However, that is not always possible and the evidence shows that teams tend next to look to unsigned veteran players whose experience makes it possible for them to provide more immediate help than would be provided by a less experienced player. For example, Harold Jackson had been signed by the Vikings late in 1982, even though he had never participated in Minnesota's training camp. Indeed, due to injuries incurred by regular receivers, McCullum had been signed by Minnesota earlier during that same season, even though he had not participated in the Vikings' training camp and preseason games for that season.

In view of the foregoing considerations, I conclude that after the third quarter of 1984, McCullum incurred a willful loss of earnings by failing to continue seeking comparable interim employment commensurate with his background and experience as a professional wide receiver. As a result, although ''he did not retire [by sending his resignation notice to the Vikings on August 28, 1984], he effectively removed himself from the job market,'' *Continental Insurance Co*., supra, by his subsequent inaction, and, accordingly, is not entitled to backpay for the remainder of the backpay period after the third quarter of 1984.

IV. CALCULATION OF NET BACKPAY

Because professional football is a seasonal industry, Respondent proposes that a more ''accurate picture of the realities of the case'' will be produced by bifurcating each calendar year into seasonal and nonseasonal segments, instead of applying the normal calendar quarter method specified in *F. W. Woolworth Co*., 90 NLRB 289 (1950). In some situations such an argument *might* have some merit, or at least require closer examination of the reasons for applying that method of calculating backpay to them. For example, this might have been necessary had McCullum accepted employment with a CFL team that plays a season beginning and ending before the NFL season—one that begins in the second calendar quarter and does not extend so long into the fourth calendar quarter as do the seasons of NFL teams.

However, in essence, the sole reason that Respondent advances for its proposal is that its net backpay would be reduced, at least at some points, by substituting a semiannul division for a calendar quarterly one. That hardly is a compelling policy reason for altering the Board's usual method of calculating backpay. Nor is any other public policy reason for changing suggested by the circumstances of McCullum's backpay period. So far as the evidence discloses, Respondent's position is no different from that of any other respondent in a seasonal industry. Therefore, I shall calculate McCullum's net backpay by applying the normal calendar quarter method for doing so.

As I requested, both the General Counsel and Respondent have submitted proposed quarterly backpay computations: the General Counsel in a summary of backpay liability by quarters, and Respondent in a backpay calculations. The parties agree that for the third calendar quarter of 1982, gross backpay should include the two regular season games played by Respondent during that quarter. That amounts to $10,000 per game for a total of $20,000. Moreover, the parties agree that gross backpay for this quarter, as for succeeding quarters, properly includes off-field personal appearances that McCullum would have made, had he not been unlawfully waived by Respondent. However, Respondent apparently overlooked the effects of amendments and testimony on the quarterly amounts attributed to those appearances in the amended backpay specification, with the result that adjustments are not made in the calculations. For example, Respondent adopts the amended specification's $225 figure for this calendar quarter, whereas the General Counsel's summary claims only $142 as a result of the record. In light of what occurred during the hearing, and in view of the General Counsel's recalculation, I conclude that gross backpay for this calendar quarter is $20,142.

As discussed in section III, supra, McCullum did not incur a willful loss of earnings by declining Minnesota's initial employment offer. Thus, his only interim earnings for the third calendar quarter of 1982 are the $10,000 that he actually received during that quarter from the Vikings. He is not also deemed to have constructively earned an additional $10,000 because his failure to accept that team's initial offer deprived him of eligibility for Minnesota's first regular season game. Respondent does not dispute that from the interim earnings figure should be deducted McCullum's expenses incurred in generating that income. Nor does Respondent dispute that those expenses total $1,070 for this particular quarter. Therefore, I conclude that net backpay for the third calendar quarter of 1982 amounts to $11,212.

All parties agree that for the fourth calendar quarter of 1982, McCullum's gross backpay would have been $60,383, that his actual interim earnings had been $60,000, and that $3174 should be deducted from those interim earnings as expenses incurred in generating them. Therefore, I conclude that net backpay for the fourth calendar quarter of 1982 is $3,557.

For the first calendar quarter of 1983, the parties agree that McCullum would have earned $10,000 playing in Respondent's last regular season game and that he would have received additional money for off-field personal appearances,

although, for the apparent reason described above, there is a $133 variance in the amounts listed in the summary and calculations, with the General Counsel computing that amount to be $3,450 and Respondent computing it as $3,317. Furthermore, the parties agree that McCullum actually earned $10,000 playing for Minnesota in its final regular season game, which should be reduced by $857 for expenses incurred in generating that interim income. However, there is a significant dispute about an additional $16,000 received by McCullum during the first calendar quarter of 1983.

Respondent's 1982 season record did not qualify it for postseason play, but Minnesota's record did qualify it for the playoffs. The Vikings won their first game and lost the next one that was played, thereby being eliminated from further postseason competition. For having played in those two games, each Minnesota player received a total of $16,000—money that McCullum would not have received had he continued to play for Respondent. Contrary to McCullum and the General Counsel, Respondent contends that this money constituted interim earnings, deductible from gross backpay. I agree.

This is not a situation in which Minnesota paid bonuses to its players for outstanding performances during the course of the 1982 regular season. The players could only earn that money by participating in additional games. Nor is it a situation where payments were received by players for having played overtime periods during regular season games, thereby incurring, in effect, overtime payments. Rather, Minnesota's season was prolonged beyond Respondent's season and McCullum was paid for his extra work during that prolonged season. Neither McCullum nor the General Counsel has cited any authority for the proposition that where an interim seasonal employer's season extends beyond that of the respondent, a claimant's income from having worked during the former's prolonged portion of the season is excluded from interim earnings. Yet, that is what occurred in this case during the first calendar quarter of 1983.

It is not significant that the Vikings were able to prolong their season by virtue of better performance than Respondent, as measured by comparative records. In no other seasonal industry does the Board take into account the reason why one employer's season extends longer than that of another one. And, in no other seasonal industry does the Board exclude from interim earnings the excess earned from working a more prolonged season as a result of the interim employer's more successful, or better method, of operation than the seasonal employer who committed the unfair labor practice(s). The record suggests no reason why the professional football industry should be treated differently. In all such situation, prolonged seasons are, at least to some extent, the result of the efforts of employees working for the employer.

Two other points are work noting in connection with the $16,000 received by McCullum. First, most of the income that he would have received from off-season personal appearances was from Seahawk basketball games played during the off-season. Although not a function operated by Respondent, only members of Respondent's team can play Seahawk basketball, an informally organized group of Respondent's players who are paid for playing basketball at fund raisers conducted by various Seattle-area civic groups. The General Counsel's theory for recovering these amounts, with which I agree, is that having unlawfully waived McCullum, Respondent effectively precluded him from earning income from participating in this postseason activity. Yet, as a member of the 1982 Vikings, McCullum was able to participate in that team's postseason activity. Consequently, just as Respondent's unfair labor practice deprived McCullum of access to a source of income based on a relationship with that team, by participation in one type of athletic activity, his membership on the interim employer's team enabled him to earn income by participating in another type of athletic activity—one more commensurate with McCullum's background and experience.

Second, there appears to be no dispute that had McCullum signed with a USFL team and played during that team's spring season, he would have been assigned interim earnings during the calendar quarters in which that team's games had been played. Yet, there is no difference, so far as the record discloses, between playing wide receiver for a USFL team and playing wide receiver for the NFL's Minnesota Vikings, although obviously the caliber of play—the level of competition—would have been higher with the latter. The point is that the reason for the game being played is not a significant distinction. In both instances, McCullum would have been paid for using his skills to play wide receiver for a professional football team.

In view of the foregoing considerations, I conclude that the $16,000 received by McCullum for playing in Minnesota's final two games should be included as interim earnings, with the result that his total interim earnings for the first calendar quarter of 1983 exceeded the amount of gross backpay claimed for that same quarter. Therefore, I conclude that there is no net backpay owing for the first calendar quarter of 1983.

For the second calendar quarter the General Counsel contends that gross backpay should consist of $121, paid by Respondent for participating in its spring minicamp, and $1075 for off-season personal appearances, principally for appearances in Seahawk basketball. Respondent does not challenge the fact that McCullum would have earned $121 for participation in its minicamp. Moreover, in its calculations it lists an amount of $1033 for off-season personal appearances, reflecting the amount enumerated in the amended specification and thereby failing to account for the $42 change dictated by the record. However, while there is no significant arithmetical dispute concerning the amount that would have been earned for off-season personal appearances, Respondent does challenge altogether inclusion of any amount in gross backpay for such appearances during this calendar quarter.

First, it argues that McCullum would have been cut by Coach Knox as a result of minicamp performance and, consequently, McCullum would not have received further gross backpay during this and the remaining quarters of the backpay period. However, in section II, supra, I concluded that a preponderance of the evidence did not support that argument. Thus, it cannot be a basis for depriving McCullum of backpay for personal appearances during this and succeeding quarters.

Second, Respondent contends that McCullum failed to mitigate his losses by seeking interim employment during the second calendar quarter of 1983. Of course, in section III, supra, I agreed with that contention as applied to the period after the third calendar quarter of 1984. However, that conclusion was based on the admissions of McCullum and his

agent Walsh, elicited during the course of their testimony. In contrast, Respondent, who bears the burden of doing so, adduced no evidence showing that McCullum had failed to exercise reasonable efforts to mitigate his losses during the second calendar quarter of 1983, the intervening period between his two 1-year playing contracts with the Vikings. Consequently, there is no evidence to support a contention of willful loss of earnings during that quarter.

Finally, Respondent contends that the amount claimed for personal appearances is only an estimate and, further, that McCullum should not be compensated for losses from Seahawk basketball because he admitted not having paid income taxes on amounts received from that activity in prior years. Of course, nonpayment of taxes can hardly be applauded. But past violations of other statutes does not bar operation of the Act's remedial provisions. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). Moreover, there is nothing inherently improper in relying upon estimates as a basis for calculating gross backpay for irregularly conducted activities for which no payroll or other records are maintained. During the hearing Respondent made no effort to further refine the backpay amount attributed to Seahawk basketball. Surely it could, at least, have tried to identify its former players who had actually participated in that program during the second quarter of 1983, thereby providing a source for ascertaining the number of such games actually played. Respondent did not claim that it was unable to do so and there is no other basis in the record for changing the estimate that led to the amounts claimed for off-season personal appearances. In view of the foregoing considerations, I conclude that net backpay for the second calendar quarter of 1983 is $1,196.

For the third calendar quarter of 1983, there is a $163 difference in net backpay between the General Counsel's summary and Respondent's calculations, arising from a difference in result reached for personal appearances and for expenditures incurred in generating interim employment. As in preceding quarters, this appears to be no more than a computational problem. Thus, there is no disagreement that, during this particular quarter, McCullum would have received $50,887 playing for Respondent, taking into account an added preseason game that Minnesota did not play, and did receive $49,600 playing for the Vikings. Respondent lists personal appearance income as $225 for the quarter, while the General Counsel calculates an amount of $562. However, with regard to expenses incurred in generating interim employment, Respondent would allow $3395, while the General Counsel allowed the lesser deduction from interim earnings of $3174. Inasmuch as it appears that the General Counsel's figures correctly reflect the changes developed during the hearing in the figures enumerated in the amended specification. I conclude that the net backpay for the third calendar quarter of 1983 amounts to $4744.

Aside from the above-noted dispute concerning McCullum's continued membership on its team, Respondent does not dispute either the elements or the arithmetical computations for the fourth calendar quarter of 1983: gross backpay of $155,133, representing $138,750 earnings for regular season play, $16,000 for Respondent's two postseason games played in that quarter, and $383 for personal appearances; and, interim earnings totaling $138,750 for regular season play, no earnings for postseason play because Minnesota's record did not qualify it for the playoffs, and $4038 deducted from interim earnings as costs incurred in generating interim employment. Therefore, I conclude that net backpay for the fourth calendar quarter of 1983 amounts to $20,421.

Since I have concluded in section II, supra, that a preponderance of the evidence fails to show that McCullum would not have remained a member of Respondent's team throughout its 1983 season, I conclude that gross backpay for the first calendar quarter of 1984 should also include $18,000 that each of Respondent's players received for playing in the American Football Conference Championship Game, played at the beginning of that quarter. In addition, Respondent agrees that during this quarter McCullum would have earned income from personal appearances, although based upon the evidence the General Counsel enumerates an amount that is $133 more than Respondent lists on the basis of the uncorrected amended specification. Accordingly, I conclude that gross backpay for this calendar quarter is $21,450. The record discloses no interim earnings for this quarter and, as was true for the second calendar quarter of 1983, Respondent has failed to adduce evidence showing a willful loss of earnings during this quarter. Therefore, I conclude that net backpay for the first calendar quarter of 1984 amounts to $21,450.

In section III, supra, I concluded that a preponderance of the evidence does not support any contention that McCullum would have encountered the difficulties concluding negotiations for a 1984 playing contract that he encountered with Minnesota and, further, that a preponderance of the evidence does not support the contention that Coach Knox would have cut McCullum at any point before and during the 1984 season. Consequently, based upon the evidence, he is entitled to gross backpay for Respondent's minicamp and for off-season personal appearances during the second calendar quarter of 1984. The parties agree that the former amounted to $129 and, although there is a $42 disparity between their computations for personal appearances, the record appears to support the amount of $1075. Thus, gross backpay for this quarter is $1204. Moreover. no interim earnings have been shown for the quarter and neither has a willful loss of earnings been established. Therefore, I conclude that net backpay for the second calendar quarter of 1984 amounts to $1204.

Inasmuch as McCullum's agent sought employment for his as a wide receiver throughout most, if not all, of the third calendar quarter of 1984—''into the fall''—I conclude that he is entitled to net backpay for that quarter in the amount of $70,142. Seventy thousand dollars of that amount represents salary he concededly would have received playing football for Respondent. In addition, based upon the amended backpay specification, Respondent enumerates $225 that McCullum would have received for personal appearances. However, relying upon the record at the conclusion of the hearing, the General Counsel claims only $142 for such appearances during this calendar quarter and that does appear to be more accurate. Consequently, gross backpay for this quarter is $70,142. Furthermore, as discussed in section III, supra, Walsh sought unsuccessfully to locate both football-playing and nonfootball-playing positions for McCullum, with the result that no interim earnings were generated. Therefore, I conclude that net backpay for the third calendar quarter of 1984 amounts to $70,142.

As concluded in section III, supra, McCullum incurred a willful loss of earnings after the third calendar quarter of 1984 by abandoning all further efforts to locate comparable employment commensurate with his experience and skills as a wide receiver. However, it is not disputed that he would have received income from personal appearances during the remainder of the backpay period, had Respondent not unlawfully waived him in 1982. As discussed in section III, supra, he and Walsh sought nonfootball-playing employment for McCullum, at least until the latter became director of the state traffic safety commission, a job that generated earnings which all parties agree constitute interim earnings. Even though at least some of the specific types of employment sought by McCullum differed from the type of employment that would have been generated from personal appearances while a member of Respondent's team, that difference is one of form, not substance. Therefore, I conclude that, despite his lack of efforts to obtain football-related employment during the remainder of the backpay period, McCullum did not incur a willful loss of earnings with respect to nonfootball earnings during the remainder of the backpay period and, accordingly, is entitled to the personal appearance portion of gross backpay through the fourth calendar quarter of 1985.

The parties agree that during the final calendar quarter of 1984, McCullum would have received $383 from personal appearances, with no interim earnings generated by his efforts to locate nonfootball-playing employment. Consequently, there is net backpay of $383 for the fourth calendar quarter of 1984. For the following calendar quarter there is a $131 computational disparity and, in light of the evidence, I conclude that gross backpay should be $3450. Since the parties agree that interim earnings for this quarter are $3176, less $315 in expenses incurred to generate it, net backpay figure for the first calendar quarter of 1985 amounts to $590. Due to McCullum's income as director of the state traffic safety commission, his interim earnings for the remaining quarters of the backpay period exceed the gross backpay amounts from personal appearances that he would have earned during those same quarters, even deducting the expenses of generating that interim income. Therefore, total net backpay for the entire backpay period is $134,899.

[Recommended Order omitted from publication.]